BLANK

PAGE

IN THE

# Supreme Court of the United States

October Term, 1965

No. ~~724~~ 29

Z. T. OSBORN, JR.,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

## PETITIONER'S REPLY MEMORANDUM.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107
*Counsel for the Petitioner.*

JACK NORMAN,
213 Third Avenue North,
Nashville, Tennessee. 37201
*Of Counsel.*

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-4711 Area Code 215

BLANK

PAGE

## INDEX.


| | Page |
|---|---|
| PETITIONER'S REPLY MEMORANDUM | 1 |
| CONCLUSION | 6 |


## TABLE OF CITATIONS.


| | Page |
|---|---|
| Kingsland v. Dorsey, 338 U. S. 318 | 5 |
| Lopez v. United States, 373 U. S. 427 | 3 |
| Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656 (1963) | 5 |
| Olmstead v. United States, 277 U. S. 438 | 1, 3 |
| On Lee v. United States, 343 U. S. 747 | 3 |
| Sorrells v. United States, 287 U. S. 435 | 4 |

BLANK

PAGE

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 724.

Z. T. OSBORN, JR.,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## PETITIONER'S REPLY MEMORANDUM.

Petitioner's principal arguments are set forth in full in his petition for certiorari. This reply brief is devoted to answering a few points raised by respondent and to rebutting arguments which misconstrue our position.

Mr. Justice Brandeis said, in *Olmstead v. United States,* 277 U. S. 438, 471, 485:

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the

> citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

In the present case, it was a concealed Government agent who instigated the offense of which petitioner now stands convicted. We submit that, at least on two independent grounds, the conviction should be reviewed because it concerns serious aspects of federal criminal justice.

*First.* The prosecution's suggestion (Br. Op. 7-8) that here "there has been some prior judicial determination that use of a recording device is justified" obviously seeks to equate what was done here with the usual application for a search warrant.

But, as we have previously shown in detail (Pet. 16-17), the present situation differs so markedly from the normal course of search warrant procedure that the two are not even comparable.

We submit that the prosecution's effort to identify the present "authorization" to an undercover agent wired for sound, who never identified himself as a gov-

ernment agent, much less admitted that he was carrying a recording device, with the solemn procedure required by the Fourth Amendment, makes a mockery of a solemn constitutional guaranty.

*Second.* While, as we have argued, the present case differs from *Lopez v. United States,* 373 U. S. 427, in that there the defendant knew at all times that he was dealing with a government agent, and hence more closely resembles *On Lee v. United States,* 343 U. S. 747, where Chin Poy was masquerading as a friend, we submit that the circumstance that Vick here was produced as a witness hardly distinguishes the *On Lee* case, as the prosecution indeed seems to urge (Br. Op. 7, note 3).

Basically, the question is whether the use of the double deception employed here—a recording device concealed on the person of an individual whose status as a government agent was also concealed—measures up to the standards this Court requires for the conduct of a criminal trial in courts of the United States. And, even more importantly—whether it squares with the constitutional prohibition of unreasonable searches and seizures and the constitutional prohibition forbidding a person being compelled to be a witness against himself and forfeit his right of privacy—particularly here, where this dual subterfuge was employed with the sanction of two United States judges, who thus became active participants in the business of apprehending suspected offenders.

We submit that the course of conduct engaged in by the judges here, now approved and sanctioned by the decision below, strongly argues for reexamination of the doctrine spawned by the *Olmstead* case. We sug-

gest that it is accordingly once again time to inquire whether electronic ingenuity shall be permitted to overcome the Constitution.

*Third.* Insofar as any offense at all was committed here, it resulted from the importunities of the government agent, Vick.

This is not, as the prosecution urges (Br. Op. 9), "an undercover informant's request to purchase narcotics from a defendant," for two reasons.

One, the undercover informer intends to purchase narcotics and does so; here, however, Vick never had the slightest intention of approaching his cousin Elliott (132a-133a, 260a-263a).

Two, the undercover agent simply asks to purchase narcotics, he does not undertake an extended campaign of persuasion to induce the defendant to sell. The usual narcotics purchase case—or, during Prohibition, the usual liquor purchase case—is one of a willing seller. Indeed, this Court first recognized the doctrine of entrapment in a situation where the undercover decoy had importuned the defendant over an extended period. *Sorrells v. United States,* 287 U. S. 435.

Here there was involved just such a campaign of persuasion, with perhaps this variant, that whereas the undercover *agent provocateur* is more normally enlisted by law enforcement personnel (generally because of pressure they are able to exert because of the undercover informant's prior encounters with the law), here Vick volunteered and himself sought employment[1] as undercover agent to spy on the man who had only employed him after being several times asked to do so

1. As soon as Vick was employed by petitioner on October 28, he telephoned "this fact to Walter J. Sheridan" (653a). Previously on October 21, Vick had told Sheridan that Elliott was his cousin (349a).

(129a, 223a-226a, 259a-260a)—and Vick sought such undercover status in order to make a case against his own employer, the present petitioner (266a-267a, quoted at Pet. 9).

The Government passes over lightly the uncontradicted fact that "Vick mentioned having a cousin on the jury panel," but after frankly conceding that it was "Vick's initiation of this idea" condemns petitioner's subsequent conduct (Br. Op. 9).

The issue is thus drawn. Does our Government have a right to lead people[2] into temptation where without that temptation no crime would have been committed. We think not. In a very real sense this is an instance of crime manufactured because and only because of Vick who set out to "make a case" (267a). Consequently there was entrapment as a matter of law.

This Court under its supervisory[3] power of the "administration of criminal justice in the Federal

2. Even a member of the bar has some rights to a fair hearing. *Kingsland v. Dorsey*, 338 U. S. 318, 320. (Dissenting opinion by Mr. Justice Jackson.) Count Two of the indictment in which petitioner was acquitted should not be used as a basis to find that petitioner had a predisposition to commit the offense charged in Count One. There is no evidence in this case that the petitioner was engaged in the proscribed conduct to justify the entrapment by the Government. Vick said he wanted to know what petitioner's intentions were. That proves he did not know. Both counsel for the Government and the district judges did not believe and indeed had no basis for believing that, *at the time* that Vick was endeavoring to ascertain petitioner's intentions, he was engaged in any such proscribed conduct (55b). The attempt by the Government to bolster up Vick's unlawful entrapment of the petitioner by adding Counts 2 and 3 to the indictment in order to show that there was a predisposition on the part of the petitioner was clearly prejudicial. Count 3 was dropped by the Government before the trial having supplied "background," and Count 2, which alleged an endeavor a year before Count 1 and also supplied "background," simply was an incredible story by Beard which the jury properly refused to believe.

3. Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

Courts" should not sanction such conduct by the Government.

## CONCLUSION.

For the foregoing additional reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
*Counsel for the Petitioner.*

JACK NORMAN,
213 Third Avenue North,
Nashville, Tennessee 37201,
*Of Counsel.*

December 1965.

BLANK

PAGE